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No. 89-999

In The

Supreme Court of the United States

October Term, 1989

MARION TERWILLIGER,

Petitioner,

v.

GREYHOUND LINES, INC.,
A FOREIGN CORPORATION AND JAMES
SELBY, JOINTLY AND SEVERALLY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals, Sixth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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STATUTES:

Section 301 of the Labor Managements Relations Act, 28 U.S.C. § 185 ..... *passim*

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

The instant reply brief will not be a vehicle for extended reiteration of the reasons that this Honorable Court should grant the petition for certiorari. Instead, the instant reply brief will rebut and refute Respondents' arguments made in their response to the petition for certiorari.

A. ALTHOUGH AT TRIAL, EACH PARTY PRESENTED A CONFLICTING VIEW OF THE EVENTS OUT OF WHICH THE CLAIM AROSE, PETITIONER PRESENTED, AND THE JURY ACCEPTED, SUFFICIENT EVIDENCE TO PROVE A CASE OF FRAUDULENT ALTERATION AND WITHHOLDING OF MEDICAL DOCUMENTS.

In their brief in response to petition for certiorari, Respondents accuse Petitioner of "misrepresentation", and challenge Petitioner's recitation of the facts, substituting instead its own, claiming it to be based upon "undisputed" facts. (Response, at p 2).

Actually, there is a kernel of truth in Respondents' claim–just enough to make it misleading. In fact, much of the material presented by Respondents was presented at trial, without rebuttal. It went unrebutted, however, because it consists of material totally irrelevant to Petitioner's claim of fraudulent misconduct against Respondents. Respondents' trial defense was to focus on unrelated behavior of plaintiff in 1959, 1966, 1976, and other irrelevant periods of time in a continuing attempt to

smear this Petitioner, rather than rebut the truth or falsity of his essential claim.

All of the facts as set out in Petitioner's petition for writ of certiorari are supported with a citation to testimony taken at the trial, or from documents admitted into evidence at trial. Plaintiff proved, to the satisfaction of the jury and trial court, by a preponderance of the evidence, that there was fraudulent concealment of significant facts by Greyhound. (See Appendix D, p 8 of Appendix to petition for writ of certiorari).

Respondents cannot have things both ways. They rely upon the Sixth Circuit opinion as being correct as a matter of law. Yet, they put forward a counter-statement of facts which was rejected by the jury below, and seek to have this Honorable Court assess the correctness of the Sixth Circuit opinion by reference to a set of facts different from those upon which the jury verdict was founded. Defendants intentionally and fraudulently concealed and altered medical information so as to make it appear that Petitioner was suffering from a heart condition from 1972 through 1984. The Sixth Circuit held, under labor law principles, that such did not state a state law claim of fraud which could go unpreempted by Section 301 of the Labor Management Relations Act, 29 USC § 185. Insofar as the Sixth Circuit questioned the underlying validity of Petitioner's fraud claim, it is in error. For the Sixth Circuit opinion to be legally correct, preemption must lie when Petitioner's claim of fraud is presumed true, as the jury so found.

B. THE DUTY TO NOT ALTER OR WITHHOLD CRUCIAL MEDICAL RECORDS ARISES NOT OUT OF ANY COLLECTIVE BARGAINING AGREEMENT, BUT ONLY OUT OF THE STATE LAW OF COMMON LAW FRAUD.

Respondents, of course, seek to tie all that happened within this case to provisions within the collective bargaining agreement. They do so, of course, to bring themselves within the guidelines of preemption as set out by *Lingle v. Norge Division of Magic Chef*, 486 US 399; 108 S Ct 1877; 100 L Ed 2d 410 (1988) and *Allis-Chalmers Corp v. Lueck*, 471 US 202; 105 S Ct 1904; 85 L Ed 2d 206 (1985). Respondents stretch this tactic to the breaking point, however, in arguing that the only duties owed to an employee, such as Petitioner, are those set out in the collective bargaining agreement.

Specifically, Respondents state that there was no requirement to furnish the second (favorable) Kanter report to Petitioner, to the union, or to subsequent employers of Petitioner. Respondents base this position on the lack of a requirement, spelled out in the collective bargaining agreement, to provide a specific document absent a specific request from the union. (Response, at p 18). Incredibly, this argument has been raised throughout the proceedings by Respondents. This argument, more than any other, shows the need for this Court to interpret Section 301 so that union members do not forfeit protection from fraud by entering a workplace governed by a collective bargaining agreement.

Remember, in the instant case, there was a first doctor's report, which was altered to include a reference to a section of the DOT regulations on heart disease. When

pressured by company officials, per the Al Young memo, to clearly disqualify Marion Terwilliger on the basis of his heart, the doctor fired off a second report, with a cover letter, stating that Mr. Terwilliger suffered from no present heart condition. The existence of this second report and letter was never revealed by the company. Instead, whenever anyone thereafter requested the doctor's report, the *first*, faulty, report was provided. Respondents, in their response, cynically argue that this is permissible because the union never made a proper request, pursuant to the collective bargaining agreement, for the *second* document, the existence of which had never been revealed.

The reason that protection against this kind of behavior – intentional, fraudulent activity – must remain subject to state law protection rather than protection under Section 301 of the LMRA is clear. Agreement to refrain from fraudulent behavior of the type described above cannot be the subject of a single collective bargaining agreement in the entire country.

In the end, Respondents' argument has no credibility. Plaintiff proved, to the satisfaction of a jury, that medical records were altered (the first Kanter report), or concealed (the Kanter letter, the second Kanter report, the Al Young memo) in such a way as to make it appear as though plaintiff was suffering from a current heart condition. Plaintiff proved that, in fact, the opposite was true – the concealed report of the doctor in question showed the plaintiff to be free of current heart problems. The effect of the alteration and concealment was to deprive plaintiff of not only his job, but also his marriage and ten years of his life. The remedies available under contractual arbitration,

as of 1985, would be inadequate to compensate plaintiff for all that he lost.

Respondents' behavior fell entirely outside the ambit of the collective bargaining agreement (i.e., there was no provision on whether the company was permitted to conceal or alter medical records) and the result of its fraud cannot be fully remedied by the traditional grievance procedure. The Sixth Circuit erred in finding preemption under the above facts.

C. THERE IS ACTUAL CONFLICT BETWEEN THE DECISION IN *WELLS, SUPRA* AND *TERWILLIGER*.

Petitioner's claim of fraud is not dependent on interpretation of the collective bargaining agreement. Instead, Respondents have sought to inject the agreement as a defense to the fraud claim. However, such practice was rejected by the Fifth Circuit, in *Wells v. General Motors Corp*, 881 F2d 166 (5th Cir 1989). Respondents deny that any conflict exists between the instant case and *Wells*. Instead, Respondents seek to harmonize the results. (Response, at 20-21). Yet, ironically, Respondents make many of the same arguments that were unsuccessfully made by defendant General Motors in *Wells*.

As Respondents have herein, GM submitted a version of the facts which "contradicts that of the plaintiff and the union in every important respect." *Wells*, at 168. GM also attempted to argue that, because the consequences of accepting the VTEP must be construed through the language of VTEP, a case alleging misrepresentation of the rights contained in the VTEP must be

preempted. *Id* at 173. The Sixth Circuit approved a similar defense in the instant case; the Fifth Circuit, in *Wells*, rejected it, stating:

> "But that is not a defense to a fraudulent inducement claim in this context. The dispute is a highly fact-bound one concerning what was said, or promised, at the meeting. The defense to such a claim is not that 'the VTEP must be construed to say otherwise'; rather, it is that 'we made no such representation' or that 'no such representation could have been made given the VTEP's provision.' " *Id*.

The dispute herein is also highly fact-bound, and concerns what was done, or not done, by the company in response to requests by union, outside employers, etc., as to the condition of Marion Terwilliger's heart. The Fifth Circuit, under *Wells*, would hold Terwilliger's claim not preempted; the Sixth Circuit held it to be preempted.

Wells and *Terwilliger* are much alike. However, the two cases differ in the respective courts' application of federal labor law to the facts. In *Terwilliger*, the Sixth Circuit permitted a defendant against whom fraud was alleged to claim preemption on the basis that the fraud incidentally involved a procedure covered by a collective bargaining agreement. The *Wells* court rejected the argument that preemption lies whenever a procedure which is a subject of a collective bargaining agreement is incidentally involved in an otherwise unconnected fraud claim. The *Wells* court holding cannot be more in conflict with that of *Terwilliger*:

> "Under these narrow circumstances, the rationale supporting Section 301 preemption, i.e.,

> avoiding the danger of inconsistent interpretations of collectively bargained labor agreements, is not at work. Mississippi has a deeply rooted interest in protecting its citizens from fraudulent conduct, and unlike the federal scheme, provides remedies designed to compensate the victims of fraud for economic harm they may have suffered as a result of their reliance upon false promises. [citation omitted]. Accordingly, we conclude that there is no federal preemption here." *Id* at 175.

Michigan, too, has a deeply rooted interest in protecting its citizens from fraudulent conduct. The type of conduct engaged in by Greyhound, as alleged by plaintiff and found by a jury, is not the subject of the collective bargaining agreement, and caused damages beyond which can be compensated in a grievance procedure.

Petitioner submits that the Sixth Circuit is in error in finding Marion Terwilliger's claim to be preempted by Section 301. In any event, any reasonable comparison of *Wells* and *Terwilliger* reveals that the two cases are in conflict as to the application of *Lingle* in a situation where a plaintiff alleges a state law fraud claim which, in some way, touches upon a subject of a collective bargaining agreement. This Honorable Court should grant certiorari to resolve that conflict.

Respectfully submitted,

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